ALCONTARA A/L AMBROSS ANTHONY *a*

v.

PUBLIC PROSECUTOR

FEDERAL COURT, PENANG *b*
TAN SRI DATO' EDGAR JOSEPH JR. FCJ
DATO' MOHAMED DZAIDDIN HJ. ABDULLAH FCJ
TUAN GOPAL SRI RAM JCA
[CRIMINAL APPEAL NO. 05-55-94]
31 JANUARY 1996 *c*

CRIMINAL LAW & PROCEDURE: *Trial - Unjustified inference - Trial Judge concluding contrary to evidence that there had been a belated disclosure of defence - Whether a serious misdirection - Whether sufficient to vitiate the conviction - Belated disclosure of defence - Whether could give rise to any inference of guilt - Comments by trial Judge on belated defence - Whether to be made with care and fairness.* *d*

CRIMINAL LAW & PROCEDURE: *Burden of proof - Failure by defence to put its case to appropriate prosecution witnesses - Whether could give rise to adverse effect - Whether accused disentitled to raise issues at defence stage - Whether could relieve prosecution from duty of establishing charge beyond reasonable doubt - Whether Court still bound to consider defence and to acquit if prosecution failed to discharge its burden.* *e*

DANGEROUS DRUGS: *Trafficking in cannabis - Section 39B(1)(a) Dangerous Drugs Act 1952 - Statutory presumptions of possession and trafficking - Sections 37(d) & 37(da) - Whether trial Judge duty bound to make finding whether presumptions had been rebutted - Omission by trial Judge to direct attention to the sections - Whether a misdirection - Whether fatal.* *f*

EVIDENCE: *Presumption - Conflict of evidence arose on material point - Result of a search - Search List prepared by police but not produced in evidence - Adverse inference - Section 114(g) Evidence Act - Whether could be invoked - Reliance by trial Judge on contents of Search List to reject defence story - Whether a material error - Whether prejudicial to accused.* *g*

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The appellant had been convicted of an offence of trafficking in 70,952.1 grams of Cannabis, in contravention of s. 39B1(a) of the Dangerous Drugs Act, 1952, and was sentenced to death. The facts showed that at the material time and place, the appellant was found to have driven a car, the boot which was laden with the offensive drugs. At the trial below, the appellant had put up a defence that he was an innocent carrier, and that, at the time of his arrest he honestly believed that he was transporting keropok for one Che Mat, for which he was *i*

paid RM300. This defence was consistent with the appellant's cautioned statement, made to the police the day after the arrest.

In convicting the appellant thus, the learned trial Judge ruled that there had been a belated disclosure of the defence, and on that ground, concluded that the appellant in fact had no explanation to offer at the time of his arrest. The Judge also took issue with the appellant's failure, at the trial, to put to the Investigating Officer, the name of Che Mat, the latter's telephone number and his place of abode, and ruled that such failure had disentitled the appellant from raising the issues at the defence stage, and consequently took the view that *"the character Che Mat was a figment of the accused's imagination plucked from the air while he was obliged to sit in the lock-up"*. It was also evident that in rejecting the defence story, and in subsequently finding that the prosecution had established *"an absolutely overwhelming circumstantial case of conclusive possession, custody, control and knowledge of the cannabis recovered from the boot of the car"*, the Judge had relied on a Search List, purportedly prepared by the police, notwithstanding that evidence in that respect had not been adduced.

In this appeal, the appellant argued in essence that the trial Judge had erred in his handling of the facts. More particularly, it was contended that the Judge's finding on the belated disclosure of defence was contrary to the evidence. It was also alleged that the Judge had misdirected himself on a number of points material to the defence, such that the conviction herein, could not, in all fairness, be allowed to stand.

Held:

Per Edgar Joseph Jr. FCJ (delivering the judgment of the Court):

[1] The evidence suggests that the first opportunity the appellant had to explain was at the time he was interviewed and his cautioned statement recorded from him the day after his arrest. There was therefore no evidence of delay on his part in offering an explanation. In fact the evidence indicates that the appellant had made prompt disclosure of his defence in his cautioned statement. It follows that it was wrong for the learned Judge to have assumed, contrary to the evidence, that there had been a belated disclosure of the defence, which suggested concoction. There was thus a misdirection by the Judge on this point.

[2] The misdirection aforesaid has to be treated in the same way as an erroneous direction to the jury, and on this ground alone the conviction could not stand. Clearly, as a result of the misdirection, the case for the appellant must have been seriously weakened in the eyes of the Judge and the chance of attaching any degree of credence to it seriously prejudiced.

[3] It was wrong for the Judge to have criticised the defence for having failed to put to the Investigating Officer, the name of Che Mat, or the latter's telephone number or his place of abode, for the simple reason that these particulars had been disclosed in the cautioned statement, which means that the police had all the time in the world to check for their veracity. That being the case, the onus was on the prosecution to check on whether the appellant's version of the facts as they appeared in his cautioned statement, was true or false. The defence were, therefore, under no duty to put these matters to the Investigating Officer. In holding the contrary, the Judge had undoubtedly overlooked the material portions of the cautioned statement touching on Che Mat, reversed the onus, and placed it on the defence, so that on this further ground also, the conviction had to be quashed.

[4] The Judge was clearly wrong when he held that *"the defence by its failure to put such questions to the prosecution witnesses ought not to be allowed to raise such issues at the defence stage"*. It is settled law that although a Court may view with suspicion a defence which has not been put to the appropriate prosecution witnesses who might have personal knowledge of the points at issue, the Court is still bound to consider the defence, however weak, and to acquit, if not satisfied that the prosecution has discharged the burden of proof which rests upon it.

[5] Nowhere in his judgment did the Judge direct his attention to the statutory presumptions as to possession in s. 37(d), and trafficking in s. 37(da), and as a result, he made no finding as to whether the defence had rebutted the same. This was a misdirection in law by way of non-direction. There may well be cases where, because of the absolutely overwhelming nature of the affirmative evidence led by the prosecution, there is no need for resort to be had to the statutory presumptions aforesaid, but even in such a case, the trial Court should specifically so find.

[6] The Judge was in error when, upon preferring the testimony of ASP Abdul Wahab to that of the appellant on the question of whether it was RM300 or RM63 that was recovered from the latter, he mentioned the Search List. The words *"as shown in the Search List served on him on the morning of the arrest"* in his judgment show clearly that the Judge preferred the testimony of ASP Abdul Wahab on the basis that, that testimony was supported by the contents of the alleged Search List when the Search List was not even in evidence. This was an error on a most material point, which was directly relevant to the defence advanced by the appellant that he was an innocent carrier, and had occasioned serious prejudice to the appellant.

[7] In a situation such as this, a copy of the Search List ought to be tendered in evidence by the prosecution or its non-production accounted for. Failure

to do that would raise the presumption that, if produced, it would have been unfavourable to the prosecution (s.114(g) Evidence Act (Revised 1974)). The Judge here, however, did just the opposite. He wrongly assumed that a copy of the Search list was in evidence, and went on to presume that its contents supported the version of ASP Wahab.

[8] The Court below had also erred when it admitted irrelevant, inadmissible and highly prejudicial evidence, more particularly that part of the testimony of ASP Abdul Wahab where he gave an account of the briefing he had given his men before mounting the road block in question. His statement that *"I informed them [his men] that information had been received that a certain Indian would be travelling in a blue Colt Gallant Mitsubishi WBE 2789 and transporting dadah proceeding from Kawasan Permatang Bendahari towards Pulau Pinang"* was clearly based on hearsay, was prejudicial to the appellant and therefore inadmissible. Although no objection had been raised to the admission of this inadmissible evidence, the Judge was nevertheless under an automatic duty to stop it from being adduced. Inadmissible evidence does not become admissible by reason of failure to object. Although the Judge had not referred to this part of ASP Abdul Wahab's testimony in his judgment, the possibility that he was swayed by it could not be ruled out.

Per curiam: When a Judge has made an adverse comment about the belated stage at which an accused had made disclosure of his defence, without an accompanying statement that the accused was under no obligation to make such prior disclosure, and that he is not drawing an inference of guilt from the belatedness of the explanation offered, such comment would usually not be fair, and so, would constitute a misdirection in law so serious that the conviction is liable to be quashed on this ground alone.

[Appeal allowed. Conviction and sentence set aside. Accused acquitted and discharged].

[Bahasa Malaysia *Translation of Headnotes]*

UNDANG-UNDANG & PROSEDUR JENAYAH: *Perbicaraan - Inferens tidak wajar - Hakim perbicaraan memutuskan bertentangan dengan keterangan bahawa telah berlakunya pendedahan pembelaan yang lewat - Samada ada suatu salah-arahan yang serius - Samada mencukupi untuk menjadikan sabitan tak sah - Pendedahan pembelaan yang lewat - Samada boleh membangkitkan apa-apa inferens bersalah - Ulasan Hakim Perbicaraan mengenai pembelaan lewat - Samada hendaklah dibuat dengan penghematan dan berpatutan.*

UNDANG-UNDANG & PROSEDUR JENAYAH: *Beban membukti - Kegagalan pembelaan untuk mengemukakan kesnya kepada saksi-saksi pendakwaan yang wajar - Samada boleh membangkitkan kesan adverse - Samada tertuduh tidak berhak untuk membangkitkan isu-isu di peringkat pembelaan - Samada boleh melepaskan pihak pendakwaan daripada kewajipan menentukan tuduhan tanpa keraguan munasabah - Samada Mahkamah masih terikat untuk menimbangkan pembelaan dan membebaskan jika pendakwaan gagal untuk melaksanakan bebannya.*

DADAH BERBAHAYA: *Mengedar cannabis - Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 - Tanggapan statutori mengenai pemilikan dan pengedaran - Seksyen-sekyen 37(d) & 37(da) - Samada Hakim Perbicaraan terikat pada kewajipan untuk membuat keputusan samada tanggapan-tanggapan telah disangkal - Peninggalan oleh Hakim perbicaraan untuk mengarahkan perhatian kepada seksyen tersebut - Samada merupakan salah-arahan - Samada memudaratkan.*

KETERANGAN: *Tanggapan - Konflik keterangan berbangkit atas perkara-perkara material - Keputusan carian - Senarai Carian disediakan oleh polis tetapi tidak dikemukakan sebagai keterangan - Inferens adverse - Seksyen 114(g) Akta Keterangan - Samada boleh digunakan - Pergantungan ke atas kandungan Senarai Carian oleh Hakim perbicaraan bagi menolak cerita pembelaan - Samada merupakan kesilapan yang material - Samada memudaratkan tertuduh.*

Perayu telah disabitkan dengan kesalahan mengedar 70,952.1 gram Cannabis, melanggari s. 39B1(a) Akta Dadah Berbahaya, 1952, dan telah dihukum mati. Fakta-fakta menunjukkan bahawa pada waktu dan tempat yang material, perayu didapati memandu sebuah kereta, boot yang mana telah dimuatkan dengan dadah berbahaya. Diperbicaraan dibawah, perayu telah mengemukakan pembelaan bahawa beliau haruslah seorang pembawa yang tidak berdosa, dan bahawa, pada waktu penangkapannya beliau sesungguhnya mempercayai bahawa beliau sedang membawa keropok untuk seseorang yang bernama Che Mat, bagi yang mana beliau dibayar upah sebanyak RM300. Pembelaan ini adalah konsisten dengan pernyataan beramarannya, yang dibuat kepada polis satu hari selepas beliau ditangkap.

Dalam mensabitkan perayu seperti yang diputuskannya, Hakim perbicaraan yang bijaksana memutuskan bahawa terdapat pendedahan pembelaan yang lewat, dan atas alasan itu, memutuskan bahawa perayu pada hakikatnya tidak mempunyai penjelasan untuk diberikan pada waktu ianya ditangkap. Hakim tersebut telah juga membangkitkan isu kegagalan perayu, di perbicaraan tersebut, untuk mengemukakan kepada Pegawai Penyiasat, nama Che Mat, nombor telefon dan tempat tinggalnya, dan memutuskan bahawa kegagalan yang sedemikian telah

menyebabkan perayu tidak berhak untuk membangkitkan isu-isu tersebut di peringkat pembelaan, dan berikutan itu berpendapat bahawa *"(orang bernama Che Mat merupakan rekaan dari khayalan tertuduh yang dihasilkannya ketika beliau terpaksa duduk di dalam lokap)."* Ianya adalah juga jelas bahawa dalam menolak cerita pembelaan tersebut, dan berikutannya memutuskan bahawa pihak pendakwaan telah berjaya mengemukakan "suatu kes yang circumstantial yang amat ketara dan menyakinkan tentang pemilikan, pengawalan penjagaan dan pengetahuan dadah yang didapati dari boot kereta tersebut" Hakim telah bergantung pada Senarai Carian, yang dikatakan telah disediakan oleh polis, tanpa menghiraukan bahawa keterangan mengenainya telah tidak dikemukakan.

Dalam rayuan ini, perayu telah berhujah secara pentingnya bahawa Hakim perbicaraan telah tersalah pertimbangan dalam pengendalian olehnya terhadap fakta-fakta tersebut. Lebih khususnya, telah ditegaskan bahawa pendapat Hakim mengenai pendedahan pembelaan yang lewat adalah bercanggahan dengan keterangan. Adalah juga dikatakan bahawa Hakim telah salah-arahkan dirinya sendiri atas beberapa perkara yang penting kepada pembelaan, menyebabkan sabitan di sini, tidak boleh, secara adilnya dibenarkan kekal.

Diputuskan:

Oleh Edgar Joseph Jr. HMP (menyampaikan keputusan Mahkamah):

[1] Keterangan menyarankan bahawa peluang pertama yang diperolehi oleh perayu untuk memberikan penjelasan adalah pada waktu beliau disoal-selidik dan melalui pernyataan beramarannya yang telah dicatat daripadanya sehari selepas beliau ditahan. Dengan itu tidak terdapat keterangan mengenai kelewatan di pihaknya untuk memberikan penjelasan. Pada hakikatnya keterangan tersebut menunjukkan bahawa perayu telah membuat pendedahan tanpa berlengah-lengah mengenai pembelaanya dalam pernyataan beramarannya. Didapati bahawa adalah salah bagi Hakim yang bijaksana menganggarkan, bahawa terdapat pendedahan yang lewat mengenai pembelaan tersebut, yang menganjur kepada suatu rekaan. Dengan itu berlaku suatu salah-arahan oleh Hakim mengenai perkara ini.

[2] Salah-arahan yang tersebut di atas haruslah dipandang sama sebagai suatu arahan salah kepada juri, dan atas alasan ini sabitan tersebut tidak boleh dipertahankan. Adalah jelas, akibat salah-arahan tersebut, kes bagi pihak perayu tentunya telah dengan seriusnya kelihatan lemah dan menurut pandangan Hakim tidak boleh dipertahankan dan peluang memberikan apapun kepercayaan ke atasnya terjejas dengan seriusnya.

[3] Adalah salah bagi Hakim menegur pihak pembelaan kerana telah gagal untuk mengemukakan kepada Pegawai Penyiasat, nama Che Mat, atau nombor telefon pihak yang terkemudian itu ataupun tempat kediamannya, oleh kerana butir-butir ini telah pun didedahkan dalam pernyataan beramaran

yang bererti bahawa pihak polis mempunyai masa yang secukupnya untuk memeriksa kebenarannya. Dalam keadaan yang sedemikian, beban adalah terletak pada pihak pendakwaan untuk memeriksa samada versi yang diberikan perayu mengenai fakta-fakta tersebut sepertimana yang terdapat dalam pernyataan beramarannya, benar atau palsu. Pihak pembelaan adalah, dengan itu, tidak mempunyai apa-apa kewajipan untuk mengemukakan perkara-perkara ini kepada Pegawai Penyiasat. Dalam memutuskan sebaliknya, Hakim telah tanpa ragu-ragu tidak mengendahkan bahagian-bahagian penting pernyataan beramaran yang menyebut mengenai Che Mat, mengakaskan bebanan tersebut, dan meletakannya pada pihak pembelaan, dan oleh itu, atas alasan lanjur ini juga, sabitan tersebut haruslah dibatalkan.

[4] Hakim adalah jelas salah bilamana beliau memutuskan bahawa "*(pihak pembelaan dengan kegagalannya untuk mengemukakan soalan-soalan yang sedemikian kepada saksi-saksi pihak pendakwaan tidak seharusnya dibenarkan untuk membangkitkan isu-isu yang sedemikian di peringkat pembelaan)*." Ianya merupakan undang-undang yang tetap bahawa walaupun sesebuah Mahkamah mungkin akan memandang dengan kesangsian pembelaan yang telah tidak dikemukakan kepada saksi-saksi pendakwaan yang mungkin mengetahui secara peribadi perkara-perkara yang menjadi isu, Mahkamah masih terikat untuk menimbangkan pembelaan tersebut, walaubagaimana lemah sekalipun, dan membebaskan tertuduh, jika tidak berpuashati bahawa pihak pendakwaan telah melaksanakan beban membukti yang terletak padanya.

[5] Dalam penghakimannya, Hakim telah tidak mengarahkan perhatiannya kepada tanggapan statutori berhubung dengan pemilikan dalam s. 37(d), dan pengedaran dalam s. 37(da), dan akibat daripada itu, beliau telah tidak membuat keputusan mengenai samada pembelaan tersebut telah mematahkan tanggapan-tanggapan tersebut. Ini merupakan suatu salah-arahan di sisi undang-undang melalui ketiada-arahan. Mungkin terdapat kes-kes di mana, disebabkan oleh keterangan yang sungguh mempengaruhi yang dibawa oleh pihak pendakwaan, maka tidak perlu mendapatkan bantuan tanggapan-tanggapan yang tersebut di atas, namun demikian, Mahkamah perbicaraan seharusnya mendapati sedemikian dengan khususnya.

[6] Hakim telah tersalah pertimbangan bilamana, setelah memilih testimoni ASP Abdul Wahab daripada testimoni perayu mengenai persoalan samada ianya merupakan RM300 ataupun RM63 yang telah didapati daripada pihak yang terkemudian, beliau telah menyebut Senarai Carian. Perkataan-perkataan, *"(sepertimana yang ditunjukkan dalam Senarai Carian yang disampaikan ke atas beliau pada pagi penangkapan tersebut)."* dalam penghakimannya dengan jelas menunjukkan bahawa Hakim memilih testimoni ASP Abdul Wahab atas dasar bahawa, testimoni tersebut telah disokong oleh kandungan Senarai Carian tersebut sedangkan Senarai Carian tersebut tidak pun terdapat dalam keterangan. Terdapat kesilapan pada

perkara yang agak material, yang mana secara terus adalah relevan kepada pembelaan yang dikemukakan oleh perayu bahawa beliau merupakan pembawa yang tidak bersalah, dan telah menyebabkan kemudaratan yang serius kepada perayu tersebut.

[7] Dalam keadaan seperti ini, sesalinan dari Senarai Carian tersebut seharusnya dikemukakan dalam keterangan oleh pihak pendakwaan atau pun alasan haruslah diberikan mengapa ianya tidak dikemukakan. Kegagalan untuk melakukannya akan membangkitkan tanggapan bahawa, jika dikemukakan, ianya tidak akan memihak kepada pihak pendakwaan (s. 114(g) Akta Keterangan (Semakan 1974). Hakim disini, namun begitu, telah melakukan yang sebaliknya. Beliau telah secara salah menganggapkan bahawa sesalinan dari Senarai Carian tersebut telah dikemukakan sebagai keterangan, dan seterusnya menganggapkan bahawa kandungannya menyokong versi ASP Wahab.

[8] Mahkamah di bawah telah juga tersalah pertimbangan bilamana ianya keterangan yang tak relevan, yang tidak boleh diterima dan amat memudaratkan, lebih khususnya bahagian mengenai testimoni ASP Abdul Wahab di mana beliau telah memberi penerangan mengenai arahan yang telah beliau berikan kepada orang-orangnya sebelum mengadakan sekatan jalanraya yang dipersoalkan itu. Pernyataannya bahawa *"(Saya telah memberitahu mereka (orang-orangnya) bahawa maklumat telah diterima bahawa seseorang berbangsa India akan memandu kereta Colt Gallant Mitsubishi WBE berwarna biru dan mengangkut dadah menuju dari Kawasan Permatang Bendahari ke arah Pulau Pinang)"* adalah jelas berdasarkan khabar angin sahaja, dan adalah memudaratkan perayu dan dengan itu tidak boleh diterima. Walaupun tidak terdapat apa-apa bantahan mengenai pengakuan keterangan yang tidak boleh diterima ini, namun begitu Hakim mempunyai kewajipan secara otomatik untuk menghentikan pengemukaannya. Keterangan yang tidak boleh diterima tidak menjadi boleh diterima disebabkan oleh kegagalan untuk membantah. Walaupun Hakim tersebut telah tidak merujuk kepada bahagian ini dari testimoni ASP Wahab dalam penghakimannya, namun kemungkinan bahawa beliau telah dipengaruhi olehnya tidak boleh diketepikan.

Per curiam: Bilamana seseorang Hakim membuat ulasan yang adverse mengenai peringkat yang lewat di mana seseorang tertuduh itu telah membuat pendedahan mengenai pembelaannya, tanpa pernyataan iringan bahawa tertuduh tidak berkewajipan untuk membuat pendedahan dahulu dari itu, dan bahawa beliau tidak membuat inferens bersalah daripada penjelasan lewat yang diberikan, ulasan yang sedemikian selalunya tidak wajar, dan dengan itu, akan membentuk suatu salah-arahan di sisi undang-undang yang sungguhnya serius sehinggakan sabitan yang mengikut boleh dibatalkan atas alasan ini semata-mata.

[Rayuan dibenarkan. Sabitan dan hukuman diketepikan. Tertuduh telah dibebaskan dan dilepaskan].

Cases referred to:

Public Prosecutor v. Alcontara a/l Ambross Anthony [1993] 3 MLJ 568, [1993] 1 CLJ 206 ***(cit)***
R. v. Bateson, 54 Cr. App. R. 11 ***(foll)***
R. v. Wright, 58 Cr. App. R. 444 ***(refd)***
R. v. Littleboy [1934] 2 KB 408 ***(refd)***
R. v. Ryan [1966] 50 Cr. App. R. 144 ***(refd)***
R v. Sullivan [1967] 51 Cr. App. R. 102 ***(foll)***
R v. Hoare [1966] 2 AER 846 ***(foll)***
Teng Boon How v. Pendakwa Raya [1993] 3 MLJ 553 ***(foll)***
Lister v. Quaifee [1983] 1 WLR 48 ***(foll)***
Mohammad Radhi bin Yaakob v. PP [1991] 3 MLJ 169 ***(foll)***
Vijayaratnam v. PP [1962] 28 MLJ 106 ***(refd)***
Balasingam v. PP [1959] MLJ 193 ***(refd)***
Maxwell v. Director of Public Prosecutions 24 Cr. App. R 152 ***(foll)***
Pratt v. AG of Jamaica [1994] 2 AC 1 ***(refd)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 2, 37(d), 37(da), 39B(l)(a), 40(1), (2), (3)
Evidence Act (Revised 1974), s. 114(g)
Jamaican Constitution, s. 17(l)

For the appellant - Karpal Singh (Jagdeep Singh Deo with him); M/s. Karpal Singh & Co.
For the public prosecutor - Stanley C. Augustin; Deputy Public Prosecutor

JUDGMENT

Edgar Joseph Jr. FCJ:

In the view we took of this appeal, it is unnecessary for us to deal with the facts of the case, at any great length.

Suffice it to say, so far as the facts are concerned, that this appeal is a sequel to our judgment in *Public Prosecutor v. Alcontara a/l Ambross Anthony*, [1993] 3 MLJ 568, wherein we had reversed the judgment of acquittal entered at the close of the case for the prosecution, by the Judge in favour of the accused, who is the appellant herein on a charge that he did, on 11 August, 1987 at 5.30 a.m., at Jambatan Permatang Tok Labu, Kepala Batas, Seberang Perai, in the District of Butterworth, in the State of Pulau Pinang, traffick, in a dangerous drug, to wit, cannabis, weighing 70,952.1 grams, in contravention of s. 39B(l)(a) of the Dangerous Drugs Act, 1952, ("the Act") on the ground of misdirection as to the sufficiency of the expert testimony of the chemist on the question whether the subject matter of the charge was "cannabis" within the meaning of s. 2 of the Act. Pursuant to our order, the Judge was obliged to, and did, call upon the appellant to enter upon his defence. The appellant made his defence from the witness box but called no witnesses. In the event,

he was convicted and sentenced to death, that being the mandatory sentence required by law. The appellant appealed against that conviction. At the conclusion of the arguments, we allowed his appeal, quashed the conviction, set aside the sentence of death, and acquitted and discharged him. Our reasons for doing so now follow.

The short facts were these: On the date, and at the time and place mentioned in the charge, acting on information received, a party of police personnel had stopped a Mitsubishi Colt Gallant car bearing registration No. WBE 2789 being driven by the appellant who was the sole occupant thereof.

The search conducted of the boot of the car resulted in the recovery of the considerable quantity of the cannabis hereinbefore mentioned. He was promptly arrested and later prosecuted as aforesaid. His defence, as deposed to from the witness box, was that he was an innocent carrier. More particularly, he claimed that he sold keropok (prawn crackers) for a living, that at the time of his arrest he honestly believed that he was conveying keropok, that he did so at the behest of a certain Che Mat for a fee of RM300 which had been paid and was in his pocket and that this money was amongst the various items seized by the police. This defence though it was not without flaws which need not detain us was entirely consistent with his cautioned statement made to the police on the day after his arrest, for in it, he had mentioned Che Mat, and a telephone number which he claimed was Che Mat's, but he was unable to give Che Mat's residential address. However, he had offered to lead the police to Che Mat's place of abode but the police had not given him the opportunity to do so. The Judge, however, found that the prosecution had established "an absolutely, overwhelming circumstantial case of exclusive possession, custody, control and knowledge of the cannabis recovered from the boot of the car, and that his explanation had failed to raise a reasonable doubt."

The real point in this appeal arises from certain passages (specified below) in the grounds of the judgment wherein the Judge had criticised the defence, in terms which were totally unjustified.

In the first place, the Judge had erred in his handling of the facts, when considering the defence case, in that he had **assumed,** contrary to the evidence, that there had been a **belated disclosure of the defence** and, in specifically relying on this as a ground for rejecting the defence. This is how he put it:

> The accused did not deny that he was, at the material time of arrest, the sole occupant of the said car wherein exhibits P3 to P10 were found, but contended that at all material times he was labouring under the belief that he was conveying keropok in the boot of the said car. The Court is mindful that in the instant case

> the accused made his statement (D14) at 11.25 a.m. on 12/8/87 whereas he was arrested on 5.30 a.m. on 11/8/87 which gave him sufficient time to **concoct the story about his transportation of keropok**. (p. 108 para 2 of Appeal Record).

And, a little further down he added:

> The character Che Mat was a figment of the accused's imagination plucked from the air while he was obliged to sit in the lock-up. (p. 111**,** para 1 Appeal record).

It is implicit in the Judge's observations aforesaid that he had **assumed** that at the time of his arrest, the appellant had **no** explanation to offer **or** if he had one, it would have been materially **different** to that which he had offered in his cautioned statement recorded on the next day **or** he would have made a **confession.** With respect, there was not a scrap of evidence to support any of these **assumptions.** For example, there was not even evidence as to whether the appellant had been cautioned and an attempt made to interrogate him immediately on arrest and, if so, what his reactions were.

Thus, the evidence suggests that the **first opportunity** the appellant had to explain was at the time he was interviewed and his cautioned statement recorded from him the day after his arrest. There was, therefore, no evidence of **delay** on his part in offering an explanation. On the other hand, evidence suggests that such delay as there was, in this regard, had been occasioned entirely by the police. It follows that it was wrong for the Judge to have **assumed**, contrary to the evidence, that there had been a **belated disclosure** of the defence, which suggested concoction. On the contrary, the evidence indicates, that given the circumstances, the appellant had made **prompt disclosure** of his defence in his cautioned statement.

As a result of this misdirection, the case for the appellant must have been seriously weakened in the eyes of the Judge and the chance of his attaching any degree of credence to it seriously prejudiced.

In *R. v. Bateson, 54 Cr. App.R. 11,* (not cited to us) the misdirection complained of was a suggestion that the accused had never given his version before the trial when in fact he had and, on this ground alone, the conviction was quashed. In delivering the judgment of the Court of Appeal, Salmon LJ (as he then was) said this (at p. 18):

> We do not of course know at what conclusion this jury would have arrived had the summing up not contained the passage [suggesting that the Appellant had never told his story before the trial] to which we have referred. They might still have found him guilty. But it is quite impossible to say that it is not at any rate on the cards that they would have found him not guilty. This passage does constitute a misdirection. It is not supported by any evidence. It is clearly contrary to what we now know to be the true facts.

In *R. v. Wright, 58 Cr. App.R. 444*, Scarman LJ said:

> At the end of the day, where the appellant's case is not that the Judge erred in law but that the Judge erred in his handling of the facts, the question must be, first of all, was there error, and secondly, if there was, was it significant error which might have misled the jury?

In the present case, as in others of this class, we must treat the misdirection of a Judge of himself in the same way as an erroneous direction to a jury.

On this ground alone, we were of the view, that the conviction could not stand and had therefore to be quashed.

But before we move on to consider other aspects of this appeal we think it would not be out of place if we said something by way of guidance to the Courts below when criticizing an accused person for having made a belated disclosure of his defence. It goes without saying that our remarks which follow apply only to those cases where there has, in fact, been a belated disclosure of the defence.

It is clear law that a Judge must tread warily when commenting on the fact that an accused has chosen to conceal the lines of his defence until the trial, rather than disclosing them at or about the time of his arrest during police interrogation. He may observe that such a stance would make it difficult for the police to check the veracity of the accused's version of the facts and so detracts from the **weight** to be accorded to it. (See *R. v. Littleboy* [1934] 2 KB 408; *R. v. Ryan* [1966] 50 Cr. App. R. 144). That, however, is as far as he can go, for should he go further and infer that such non-disclosure provides a basis for assuming that the accused is **guilty**, (see e.g. *R. v. Sullivan* [1967] 51 Cr. App. R. 102: *R. v. Hoare* [1966] 2 AER 846 (1966) 50 Cr. App. R. 166), he would be misdirecting himself in law.

Having said that, we must add that, when a Judge has made an adverse comment about the belated stage at which an accused had made disclosure of his defence, **without an accompanying statement that the accused was under no obligation to make such prior disclosure, and that he is not drawing an inference of guilt from the belatedness of the explanation offered,** such comment would usually not be fair and so would constitute a misdirection in law so serious that the conviction is liable to be quashed on this ground alone. In this context we would draw attention to a recent decision of this Court in *Teng Boon How v. Pendakwa Raya* [1993] 3 MLJ 553 where many of the relevant authorities on this point are referred to and analysed. In particular, we would refer, to the following passages in the judgment of the Court (at p. 565):

> Be that as it may, the Judge failed to recognise, firstly, that the appellant had a right to silence when interrogated by the police, whether before or after being cautioned. Indeed, the terms of the statutory caution under *proviso* (b) to

s. 37A(l) of the Dangerous Drugs Act 1952 merely reminds him of a right he already has at common law to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence. (Per Lord Diplock in *R v. Hall* [1971] 1 WLR 298). The exception to this rule, is where the defence of the accused is an alibi (see the statutory obligation on an accused to give notice to the prosecution of a defence of alibi under s. 402A of the Criminal Procedure Code (FMS Cap 6). Even prior to the introduction of s. 402A of the Criminal Procedure Code (FMS Cap 6), an alibi defence was an exception to the rule that it is improper for a Judge to make any adverse comment on the failure of an accused to disclose his defence until the trial. (See, e.g. *R. v. Chhui Yi* [1936] MLJ 142 and *Fazal Din v. PP* [1949] MLJ 123).

Secondly, although a Judge may properly comment that an explanation has been given for the first time at the trial, this has to be done with care and fairness to the accused in all the circumstances of the case. (See *R v. Ryan* [1973] 2 NZLR 611). The Privy Council and English authorities show that the dividing line between what is fair comment and what is not, has been recognized to be a fine one. (See 11 *Halbury's Laws of England* (4th Edn.) para. 299; *Archbold Pleading Evidence and Practice* (1992) paras. 4-407.)

It has been said that there is a clear distinction between drawing an inference of guilt from prior silence and taking into consideration such silence as diminishing the weight of any explanation given by the accused for the first time at the trial. However, as Lord Dilhorne, speaking for the Court of Appeal in *R. v. Gilbert* [1977] 66 Cr. App. R 237; [1978] Crim LR 216) rightly pointed out, there is no clear dividing line, as in each situation the jury are invited to draw an inference adverse to the accused on account of his exercise of the right to silence. It follows that, in practice, the distinction is too fine to be of any practical value even if the trial is before a Judge sitting alone.

Where the Judge takes into consideration the belatedness of an explanation offered by an accused for the first time at the trial as diminishing the weight of that explanation this will usually not be fair unless he makes it clear that he recognises the right of the accused to remain silent and that he is not drawing an inference of guilt from such silence. No particular form of words is necessary provided his mind on the matter is clearly revealed in his judgment. In the present case, the judgment of the Judge clearly suffers from these defects and so there was clearly a misdirection on this score.

We now turn to consider three further grounds for our holding that the appeal was bound to succeed.

First the Judge had misdirected himself as regards the burden of proof especially the burden on the defence. More particularly as will appear from the following passages in his grounds of judgment, the Judge had criticised the defence for not having put to the Investigating Officer, the name of Che Mat, the latter's telephone number, and address of place of abode. This is how the Judge put it:

(1) Furthermore, if the character of Che Mat existed then it is incumbent on the defence to put this question to the Investigating Officer ...

(2) It is settled law that the defence, by its failure so to put such questions to the prosecution witnesses ought not be allowed to raise such issues at the defence stage.

(3) Prosecution witnesses were also not challenged as to whether the police had taken steps (at any rate not fatal to the prosecution witnesses) to check on the telephone number given in D14 (the cautioned statement) or to locate Che Mat's house with the assistance of the accused and this became the only issue during the defence case.

Speaking generally, in a criminal trial, the whole point and purpose of the defence having to put its case to such of the prosecution witnesses as might be in a position to admit or deny it, is to enable the prosecution to check on whether an accused's version of the facts is true or false, and thus avoid the adverse comment, that the defence is a recent invention in other words, "kept up its sleeve", as it were - and revealed for the first time when the accused makes his defence from the witness box or the dock, thus detracting from the weight to be accorded to the defence. However, failure on the part of the defence to put its case as aforesaid, can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt.

At this stage, we would interpolate to remark - though we are digressing somewhat from the point concerning the onus of proof - that the Judge went so far as to hold "that the defence by its failure so to put such questions to the prosecution witnesses **ought not to be allowed to raise such** issues at the defence stage." In this, he was clearly wrong, since it is settled law, that although a Court may view with suspicion a defence which has not been put to the appropriate prosecution witnesses who might have personal knowledge of the points at issue, the Court is still bound to consider the defence, however weak, and to acquit if not satisfied that the prosecution has discharged the burden of proof which rests upon it. We are supported in this by the case of *Lister v. Quaifee* [1983] 1 WLR 48 decided by the Court of Appeal in England. May LJ in his judgment at p. 54 of the report said this:

> We have not found this at all an easy case but in the end we have come to the clear conclusion that the answer really lies in a proper appreciation of what s. 9 in fact achieves. As I have already said, this is that the contents of the statements read are evidence in the case just as if, and only to the extent as if, the makers of those statements had been called as witnesses in the trial and had given the evidence contained in the statements. If that had happened on the hearing before the King's Lynn justices in this case, and there had been no cross-examination about the possibility of mistake, or their evidence had not been challenged in any way, then when the defendant went into the witness box no doubt strong comment could have been made that nothing had been put to the

witnesses about the possibility that the defendant might indeed have been able to and did buy the dress somewhere else, in Portsmouth in particular, on 2 July 1981.

Although any such comment by the prosecutor would have had substantial force and might well have led the justices to view the defendant's evidence with a degree of scepticism, the position remains that the burden throughout was on the prosecutor and although the proper procedure of putting a defence case to prosecution witnesses had not been followed, it would have been open to the justices, having heard all three witness, to have said:

Well, it may be that procedure laid down by Marks & Spencer was what should have happened, and it may have happened in at least the majority, if not every other case concerning a dress of this nature, but we have also seen the defendant. She has given evidence. We cannot say that her evidence cannot be true, and in those circumstances there must be a doubt in our minds and accordingly we must acquit.

Stephen Brown J. said at page 55:

This case has very many unsatisfactory features, but I have great sympathy with the justices in the position into which they were put, not through their own fault. In the end, however, it is they who had the duty of weighing the evidence which had been properly admitted before them and the decision of fact was entirely for them. Whilst it may be that this Court might itself have come to a different conclusion, none the less it seems to me to be impossible to interfere with the decision of the justices, which was fully within their competence. Therefore, I agree with May LJ that this appeal must be dismissed.

To resume our discussion regarding the important point of misdirection as regards the burden of proof, especially the burden on the defence, we must point out, with respect, that it was wrong for the Judge to have criticised the defence for having failed to put to the Investigating Officer, the name of Che Mat or the latter's telephone number or his place of abode, for the simple reason that these particulars **had** been disclosed in the cautioned statement of the appellant made the day after his arrest so that the police had all the time in the world to check their veracity. That being the case, the onus was on the prosecution, to check on whether the appellant's version of the facts as they appeared in his cautioned statement and to which we have referred, was true or false. In other words, the onus was upon the prosecution to **disprove** this important part of the appellant's version of the facts. The defence were, therefore, under no duty to put the matters aforesaid to the Investigating Officer having regard to their prior disclosure in the cautioned statement. In holding to the contrary, the Judge had undoubtedly overlooked the material portions of the cautioned statement touching on Che Mat, reversed the onus, and placed it on the defence, so that on this further ground also, the conviction had to be quashed.

This brings us to the next point in this appeal. Nowhere in his judgment did the Judge direct attention to the statutory presumptions as to possession (s. 37(d)) and trafficking (s. 37(da)), and as a result, he made no finding as to whether the defence had rebutted the same. In our view, this was a misdirection in law by way of non-direction having regard to the following passage in the judgment of Azmi SCJ so in *Mohammad Radhi bin Yaakob v. PP* [1991] 3 MLJ 169, at p. 172 para 1:

> In our opinion unless the evidence in a particular case does not obviously so warrant, it is incumbent for the Court to consider whether on the balance of probabilities, the evidence of the defence has rebutted the statutory presumption of trafficking under s. 37(da) as a separate exercise even though the Court is satisfied on balance that the presumption of possession under s. 37(d) has not been rebutted. In this case, the failure to do so was a material misdirection and was fatal to the conviction.

Having said that, we would add there may well be cases where because of the absolutely overwhelming nature of the **affirmative evidence** led by the prosecution, there is no need for resort to be had to the statutory presumptions aforesaid, but even in such a case, we consider that the trial Court should specifically so find.

The ante-penultimate point upon which we must now touch concerns the alleged Search List, upon which the Judge relied in convicting the appellant, but which in fact, was never adduced in evidence.

This is how the Judge put it (at p. 109, para. 2 of the Record of Appeal):

> He (the accused) said that he was paid RM300 by Encik Mat for the services rendered yet, he could not explain why, according to ASP Abdul Wahab (PW3) only RM63 was found on him in his wallet, **as shown in the Search List served on him on the morning of the arrest** (Emphasis supplied)

Had the Judge simply preferred the testimony of ASP Abdul Wahab to that of the appellant, on the question whether it was RM300 or RM63 which was recovered from the latter, without mentioning the Search List, no exception could have been taken, to such a course. But, the words "as shown in the Search List served on him on the morning of the arrest", show clearly that the Judge preferred the testimony of ASP Abdul Wahab, on the basis that, that testimony was supported by the contents of the alleged Search List, when the Search List was not even in evidence. This was an error on a most material point, which was directly relevant to the defence advanced by the appellant that he was an innocent carrier, and had occasioned serious prejudice to the appellant.

We must add that in a situation such as this, where there was an acute conflict of evidence on a material point, namely, the result of the search of the person of the accused and a Search List contemporaneously prepared by the police was, presumably, in existence, a copy thereof, ought in all fairness, to be tendered in evidence or its non-production accounted for, the sanction for not doing so being the presumption, that if produced, it would have been unfavourable to the prosecution (see s. 114(g) Evidence Act - (Revised 1974)). Instead, the Judge did the opposite - he wrongly assumed that a copy of the Search List was in evidence and went on to present that its contents supported the version of ASP Abdul Wahab.

The penultimate point which arose for consideration, concerned the admission of certain irrelevant, inadmissible and gravely prejudicial evidence, to wit, that part of the testimony of ASP Abdul Wahab wherein he gave an account of the briefing he had given his men on the night before he had mounted the road block to stop and search the car driven by the appellant; more particularly, he said this: "I informed them [his men] that information had been received that a certain Indian would be travelling in a blue Colt Gallant Mitsubishi WBE 2789 and transporting dadah proceeding from Kawasan Permatang Bendahari towards Pulau Pinang." Now, this statement by ASP Abdul Wahab was clearly based on hearsay, was prejudicial to the appellant and therefore inadmissible. Although no objection had been raised to the admission of this inadmissible evidence, the Judge was nevertheless under an automatic duty to stop it from being adduced for inadmissible evidence does not become admissible by reason of failure to object.

In *Vijayaratnam v. PP* [1962] 28 MLJ 106, M. Hashim J, had to consider a similar point and went so far as to say (at p. 106, Col. 2 D):

> I think, if possible, the expression 'on information received' should not be used by police officers when giving evidence. It would appear to mean that somebody has given information, which may be hearsay to the police and the police acted on this information. In this particular case the police witness went on to say that on arrival at the scene he laid an ambush. This statement read in conjunction with the expression 'on information received' would tend to indicate that the police had been told that an offence would be committed. In my opinion, this would, to say the least, cloud the issue when the trial commenced and it might to a certain degree prejudice the Court against the appellant. To put it in another way, there was a probability, that the Court trying the appellant was to a certain extent influenced by the opening statement of the police witness. In my opinion such a state of affairs should be avoided.

Whilst we agree with much of what M. Hashim J said in that case, we consider that in appropriate circumstances, there is nothing objectionable in a law enforcement officer saying, by way of introduction, that "acting on information received" he took certain steps in the investigation. However, when such testimony is given, care must be taken not to divulge the contents of the

information, as happened in the present case, since this may well be open to the objection that it is hearsay and, in all probability, prejudicial to the accused. Morever, we must mention that in trials for any offence under the Act, sub-section (1) and (2) of s. 40 provide for special rules of evidence relating to the protection of informers - but note the exception provided for under sub-section (3) of s. 40.

Although the Judge had not referred to that part of ASP Abdul Wahab's testimony, quoted above, the possibility that he was swayed by it, could not be ruled out. (See *Balasingam v. PP* [1959] MLJ 193, at 194, col. 2F to H, per Ismail Khan J (later CJ (Borneo)) and its effect, might well have been to prejudice the case for the appellant.

There is a final point which must be made. Nowhere in his judgment did the Judge make the basic finding that the appellant was a trafficker within the meaning of the Act. In certain cases, this itself could be a fatal flaw sufficient to vitiate the conviction but the present case was not such a case since the defence here was a denial of knowledge as to the nature of the offending exhibit, that is to say, the defence of being an innocent carrier. Different considerations would arise, where, for instance, an accused admits possession of a drug but denies being a trafficker.

In conclusion, we must add that the appellant in this case may well consider himself a very fortunate man, because had the case been more thoroughly investigated and had the Judge not misdirected himself in the manner he did, a conviction might well have resulted. This is therefore yet another case where we found that our desire to allow what might well have been a deserved conviction to stand, must be sacrificed to the general principle of fairness in our criminal trial. This is the principle stated by the Lord Blanesborough, LC when speaking for the Judicial Committee of the House of Lords: in *Maxwell v. Director of Public Prosecutions* 24 Cr. App. R 152, at p. 176:

> It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of prosecutions should be disregarded and discredited.

For the sake of completeness, we would add that no attempt had been made by the learned Deputy to ask for a retrial. In our opinion, the learned Deputy was right in not having done so, considering that the appellant had lived in the shadow of the gallows for all these years. In such a situation it would have been approaching the confines of torture to have ordered a retrial. It is interesting to note that the Judicial Committee of the Privy Council has in *Pratt v. AG of Jamaica* [1994] 2 AC I observed (p. 35 G) that "in any case in which execution is to take place more than five years after sentence there

will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment'" within s. 17(l) of the Jamaican Constitution.

It was for the foregoing reasons that the conviction was quashed, the sentence of death set aside, and the appellant acquitted and discharged.